United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7428

To be argued by
DOROTHY F. GRAY

United States Court of Appeals

FOR THE SECOND CIRCUIT

DIVERSIFIED MORTGAGE INVESTORS,

Plaintiff-Appellee,

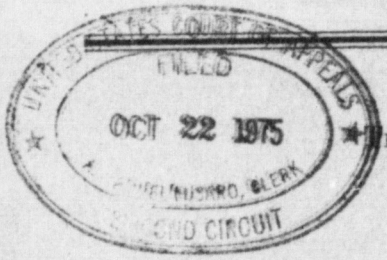
—against—

U.S. LIFE TITLE INSURANCE COMPANY OF NEW YORK,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF PLAINTIFF-APPELLEE



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BRIEF OF PLAINTIFF-APPELLEE

Issues Presented

1. Did the court below abuse its discretion in granting preliminary relief where a serious and meritorious controversy exists between the parties and where the plaintiff-appellee and 1200 innocent purchasers of land would undisputably suffer irreparable injury?
2. May the denial of a motion to dismiss a complaint be appealed prior to final judgment?
3. Did the court below abuse its discretion in refusing to stay the declaratory judgment suit pending disposition

of a mechanics' lien foreclosure action, where the foreclosure action would not dispose of the controversy between the parties herein?

Statement of Facts

The underlying action seeks a declaratory judgment against defendant-appellant (hereinafter "US Life") with respect to plaintiff-appellee's (hereinafter "DMI") rights as an insured under a policy of title insurance issued to DMI by US Life, and the resultant obligations of US Life to DMI thereunder.

DMI is a publicly owned real estate investment trust (8*) and US Life is a title insurance company with its principal office in New York (66).

During 1971, DMI made a Twelve Million ($12,000,000) Dollar first mortgage loan for the development of a recreational development located in Greene County, New York (hereinafter referred to as "Sleepy Hollow Lake") (8, 9). Sleepy Hollow Lake was to be developed as a recreational community astride the largest man-made lake in the State of New York, including an equestrian center, tennis courts, boating facilities and building lots upon which families would build vacation homes. To date, 1,200 families have made down payments on homesites at Sleepy Hollow Lake, in the first phase of the development (8, 9), pursuant to an offering statement filed by the developer with the New York Secretary of State.

To protect DMI's first mortgage lien priority, it obtained title insurance from US Life (Policy No. A66070) (21-33), and employed US Life to file and record in-

* All references in parenthesis are to pages in the appendix unless otherwise indicated.

struments as required by applicable New York law (9, 18-19). In connection with DMI's loan, and on the advice of US Life (9, 139, 141), for the purpose of providing priority for construction loan advances, DMI and the borrower executed a building loan agreement and same was forwarded to US Life for filing with the Clerk of Greene County (142-143). [The entire building loan agreement is at pp. 156-208.]

In mid-1974, the developer of Sleepy Hollow Lake, after having completed 80% of construction, defaulted on the loan and its obligations under the Mortgage (5-6, 10).

A record search after default revealed that $1,811,000 in mechanics' liens had been filed against the property, *and that US Life had failed to file the building loan agreement* (10). New York Lien Law §22 requires filing of the building loan agreement in order for construction loan advances to have priority over mechanics' liens.

US Life's failure to file the Building Loan Agreement, as agreed (141-143), prevented DMI from foreclosing upon its first mortgage lien, in that it was deprived of the defense of priority as against the lienors (10-11). Instead, these lienors instituted multiple lien foreclosure actions in Supreme Court, Greene County, in which they assert the priority of their liens over DMI's mortgage (10).

DMI was unable to advance additional funds without subordinating same to mechanics' liens until the priority status of its mortgage was restored (11).

Construction at Sleepy Hollow Lake ground to a halt and the Secretary of State threatened to take action to protect the rights of the 1,200 innocent individual lot purchasers who could not have their lots conveyed to them with marketable title (6-7). Because of the default under the loan, the filing of mechanics' liens, and receipt of numerous complaints from lot purchasers, the Secretary

of State had already declared a trust with respect to contract payments made by certain lot purchasers (6) and threatened to impose a receivership pursuant to Section 33 (e) of the New York Real Property Law unless construction at Sleepy Hollow Lake resumed (6-7). Such a receivership would have terminated Sleepy Hollow Lake's viability as a land sales project (11, 7). Inability to utilize Sleepy Hollow Lake would drastically reduce the value of the property and thus the value of DMI's loan (12).

DMI urged US Life to take steps to restore the priority status of its mortgage by bonding or discharging the liens (13) at Sleepy Hollow Lake so that it could obtain new funds to complete the Project and preserve its own economic interests and those of the 1,200 families whose investments were jeopardized.

Although it was US Life's own negligent failure to file the Building Loan Agreement which created the problem with priority of the mechanics' liens, US Life refused to take any action to remedy the problem, except to offer to defend on a totally non-meritorious basis (13, 42) and with reservation of its liability as to DMI (45). US Life's ostensible defense, created of necessity because of its negligence, is that the Building Loan Agreement which US Life itself required in order to issue insurance was not necessary (42, 56, 65, 139) for the transaction, which US Life now maintains is a mortgage securing future advances and not a building loan mortgage. Moreover, when DMI sought permission to dispose of the mechanics' liens with its own resources, US Life refused to give the consent which was required under a printed boilerplate clause of the insurance contract stating:

> "No claim for damages shall arise or be maintainable under this policy . . . for liability voluntarily

> assumed by the insured in settling any claim or suit without the written consent of this company." (31).

US Life advised DMI in writing that any settlement or discharge of mechanics' liens by DMI would result in forfeiture of its coverage under the insurance contract (42).

DMI, threatened with irretrievable loss of its total investment at Sleepy Hollow Lake, due to the halt of construction and the legal actions proposed by the Secretary of State, brought an action for declaratory judgment against US Life and sought immediate preliminary relief from the Court below seeking to require US Life to forthwith arrange for discharge of all of the mechanics' liens or, alternatively, permit DMI to settle the liens without prejudice to its ultimate rights against US Life under the insurance contract.

The Proceedings Below

The underlying Complaint (148-153) seeks a declaration that US Life negligently failed to record the Building Loan Agreement; that it has breached the good faith obligations imposed upon it arising out of the relationship between an insurer and its insured; and that US Life was obligated to take all steps necessary to restore the priority of DMI's mortgage, including settling, bonding or discharging the mechanics' liens.

DMI also sought preliminary injunctive relief during the pendency of this action:

(a) requiring US Life to discharge all of the mechanics' liens subsequent to the date of DMI's mortgage, and

(b) alternatively permitting plaintiff to settle such liens without prejudice to its rights under the policy of title insurance.

US Life cross-moved to dismiss the Complaint (49-50) on the grounds of lack of subject matter jurisdiction; failure to join necessary parties; failure to state a claim upon which relief can be granted. Additionally, US Life requested the District Court, if the Complaint were not dismissed, to stay this action in favor of the pending mechanics' lien actions in Supreme Court, Greene County.

By Opinion and Order dated July 16, 1975 Judge Weinfeld granted the second and less sweeping alternative relief requested and granted DMI permission to settle the liens with its funds. He denied the cross-motion to dismiss the Complaint and denied a stay (1-3). The court below found that:

> "[W]hile the parties to this litigation are engaged in their controversy, work on the project has been halted. The 1200 innocent lot purchasers, some of whom have paid in full for their lots and most of whom have made substantial down payments, face irreparable injury unless development of the project is resumed. Plaintiff also is exposed to irreparable injury by the standstill situation resulting from the default of the developer and unsatisfied mechanics' liens.
>
> The Court is satisfied that the interests of the plaintiff and, more importantly, the lot purchasers can be protected without prejudice to the ultimate rights of the defendant."

Upon a balancing of the equities involved, the court found that to permit the plaintiff to use its own resources to settle or dispose of the mechanics' liens would not prejudice US Life, and that if the lienors' claims were settled at less than the claimed amounts, that would necessarily inure to the benefit of the defendant (3). This is so because US Life retained the right to defend on its

ultimate liability under the contract and additionally even if liability be found, US Life retained the right to contest the validity of any lien or the amount of any settlement.

POINT I

The Court below acted properly in its grant of preliminary relief.

The equities and circumstances below mandated the result below. This Court must affirm since there was clearly no abuse of discretion or error. *Brown* v. *Chote*, 411 U.S. 452 (1973); *Brotherhood of Locomotive Engineers* v. *Missouri Kan.-Tex. R.R.*, 363 U.S. 528 (1960); *Maas* v. *United States*, 371 F.2d 348 (D.C. 1966); *Hudson Tire Mart* v. *Aetna Casualty & Surety Co.*, 518 F.2d 671 (2d Cir. 1975); *Developments in the Law-Injunctions*, 78 HARV. L. REV. 994, 1070-1072 (1965).

A. Absent the relief granted by the court below plaintiff-appellee and the public would suffer irreparable injury

DMI's proof of irreparable injury absent the granting of preliminary relief has never been challenged by US Life, either before this Court or the court below. Continued delay on Sleepy Hollow Lake will mean:

loss of its viability as a land sale project;

consequent devaluation in the property's value to a present fair market value which, after payment of prior lien claim, may require DMI to take a loss with respect to its entire $12,000,000 investment (12);

DMI's continuing loss of interest accruing at the rate of approximately $60,000/month (9);

severe impairment of DMI's ability to function in view of present economic conditions and particular difficulties in the REIT industry (12).

Furthermore, as noted by the court below, 1,200 innocent members of the public, "some of whom have paid in full for their lots and most of whom have made substantial down payments, face irreparable injury unless development of the project is resumed" (2).

B. The relief granted does not prejudice the defendant-appellant

The court below made it clear that its disposition of DMI's application for preliminary relief was without any prejudice whatsoever to US Life and thus was within the appropriate guideline of granting injunctive relief upon conditions protecting all whose interest the injunction may affect. *Brotherhood of Locomotive Engineers* v. *Missouri-Kan.-Tex. R.R.*, 363 U.S. 528 (1960). Judge Weinfeld specifically held that ". . . the interests of the plaintiff and, more importantly, the lot purchasers can be protected without prejudice to the ultimate rights of the defendant." (2). DMI was given permission

> ". . . to settle, bond, or otherwise dispose of the mechanics' liens so that they are discharged of record, but without prejudice to the rights of plaintiff and defendant in this or the state court action—particularly without prejudice to any right of disclaimer of liability which is or may become available to the defendant other than a disclaimer based upon lack of consent to settlement of the liens . . . Moreover, if plaintiff finally prevails and defendant is held liable under the policy of insurance, settlement of the [liens] at less than their claimed

> amounts necessarily will inure to the benefit of the defendant." (2).

At oral argument upon US Life's motion to stay this relief, Judge Weinfeld made it clear that his order in no way made appellant-defendant responsible for reimbursement to DMI as to any monies expended in discharging the liens of record until DMI proved US Life's responsibility therefor in the underlying declaratory judgment action. Judge Weinfeld also made it clear that should US life contest the validity of any lien which DMI arranged to have discharged, or the amount of any settlement reached by DMI in arranging for such discharge, those issues also would be decided in the declaratory judgment action. US Life's argument to the effect that Judge Weinfeld's order fixes the damages (Defendant-Appellant's Brief, p. 23) is therefore mistaken.

C. The plaintiff-appellee presented serious questions going to the merits of the controversy

A District Court may properly grant preliminary equitable relief where the party seeking the same presents sufficiently serious questions going to the merits of the controversy to make them a fair ground for litigation and the balance of hardships tips decidedly toward the plaintiff. *Columbia Picture Industries* v. *American Broadcasting Co.*, 501 F.2d 894 (2d Cir. 1974); *Sonesta Int'l Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247 (2d Cir. 1973); *Dino de Laurentiis Cinematografica* v. *D-150, Inc.*, 366 F.2d 373 (2d Cir. 1966). US Life has characterized the gravamen of the dispute between the parties as being the nature of the mortgage which it undertook to insure, to wit, DMI claims that US Life insured a building loan mortgage and US Life contends that it insured a mortgage to secure future advances (61, 67). US Life argues

at great length (51-61) that it insured a mortgage to secure future advances, that no building loan agreement had to be filed, that DMI's mortgage is prior to any mechanics' lien and indeed US Life is entitled to a reservation of rights to disclaim liability should the mortgage be found to be anything but one to secure future advances (111). DMI submitted proof to the court below that US Life had specifically requested DMI to enter into a building loan agreement, same was forwarded by DMI to US Life on May 9, 1972 for filing with the Clerk of Greene County, and that thereafter US Life issued its contract of insurance (133, 139-143). Further proof was presented as to the exact nature of the subject loan (134-135) and indeed, the underlying loan documents (156-208) were available to the District Court from the date of oral argument on July 1, 1975 until the Opinion and Order of July 16, 1975 (1-3).

DMI argues that the mortgage was a building loan, that US Life did not comply with the filing requirements of Section 22 of the New York Lien Law and that therefore the mechanics' liens are prior to construction advances under the mortgage (9-11). *P. T. McDermott, Inc.* v. *Lawyer's Mortgage Co.*, 232 N.Y. 336, 133 N.E. 909 (1922).

In addition the following serious issues exist in this matter and were considered below:

(a) US Life's liability for its negligent failure to record the Building Loan Agreement, *Israelson* v. *Williams*, 166 App. Div. 25, 151 N.Y.S. 679 (2nd Dept.), *appeal denied*, 167 App. Div. 938, 152 N.Y.S. 1119, *appeal dismissed*, 215 N.Y. 684, 109 N.E. 1079 (1915); *Ehmer* v. *Title Guarantee & Trust Co.*, 89 Hun. 120, 34 N.Y.S. 1132 (2nd Dept., 1895), *aff'd*, 156 N.Y. 10, 50 N.E. 420 (1898); *Sunset Holding Corp.* v. *Home Title Insurance Co.*, 172 Misc. 759, 16 N.Y.S.2d 273 (Sup. Ct. Kings Co. 1939);

(b) US Life's liability under the policy's terms and conditions;

(c) the good faith obligations of the appellant-insurer to its insured to settle where to do otherwise would expose the insured to ruin, *Harris* v. *Standard Accident & Insurance Co.*, 191 F.Supp. 538 (S.D.N.Y., *rev'd on other grounds*, 297 F.2d 627 (2d Cir. 1961), *cert. denied*, 369 U. S. 843 (1962); *Brown* v. *United States Fidelity & Guaranty Co.*, 314 F.2d 675 (2d Cir. 1963); *Brockstein* v. *Nationwide Mutual Ins. Company*, 417 F.2d 703 (2d Cir. 1969), *cert. denied*, 405 U.S. 921 (1972); *Kulak* v. *Nationwide Mutual Ins. Company*, —— A.D.2d ——, 366 N.Y.S.2d 927 (4th Dept. 1975).

Dopp v. *Franklin National Bank*, 461 F.2d 873 (2d Cir. 1972), relied upon by US Life, is not in point. In that case this Court found that the District Court abused its discretion in issuing preliminary relief where plaintiff's entire claim was dependent on proving the existence of an oral agreement vehemently denied by defendant, and the District Court, in granting the plaintiff preliminary relief permitted this "linchpin" factual dispute to be resolved on affidavits, merely showing preference for one piece of paper over the other, and without a hearing. In the case at bar, Judge Weinfeld had available to him for review all of the written documents underlying DMI's claim, and under those circumstances this Court should not substitute its judgment for that of Judge Weinfeld. So too, the defendant-appellee may not rely on *W.E. Bassett Company* v. *Revlon, Inc.*, 354 F.2d 868 (2d Cir. 1966) and *Omega Importing Corp.* v. *Petri-Kine Camera Co.*, 451 F.2d 1190 (2d Cir. 1971) for the proposition that this Court will substitute its own judgment for that of the District Court. In *Bassett*, this Court affirmed the granting of injunctive relief after finding that the lower court did not abuse its discretion in deciding that the

plaintiff had sufficiently demonstrated reasonable probability of success after trial. In *Omega*, this Court again recognized the latitude permitted a District Judge, but found that the lower court's denial of preliminary relief failed to protect the plaintiff which required preservation of the status quo to prevent irreparable harm.

In the instant case, Judge Weinfeld's grant of preliminary relief for the purpose of avoiding irreparable harm to plaintiff-appellee was supported by a balancing of the equities and appropriate finding of substantial and serious issues and a determination that no prejudice would befall US Life.

POINT II

The denial of defendant-appellant's motion to dismiss the complaint is not appealable at this stage of the litigation.

The District Court denied US Life's motion to dismiss the Complaint, which motion (49-50) was predicated on lack of subject matter jurisdiction, failure to join necessary parties, and failure to state a claim upon which relief can be granted. The denial of such a motion is not a final judgment from which appeal lies. 28 USCA §1291.

A denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not subject to appellate review. *Catlin* v. *United States*, 324 U.S. 229 (1944); *Pennsylvania* v. *Brown*, 373 F.2d 771 (3rd Cir. 1967). This is so because while the granting of such a motion may be a final judgment, the denial of such a motion lacks the finality which is essential to support an immediate appeal because the case still stands for the pleading and issues and for trial thereon. *Petro* v. *Bakely*,

353 F.2d 511 (3rd Cir. 1965); *Spruill* v. *Cage*, 262 F.2d 355 (6th Cir. 1958); *New Amsterdam Casualty Co.* v. *B. L. Jones & Co.*, 254 F.2d 917 (5th Cir. 1958). Indeed, this very court has reviewed denial of a motion to dismiss a declaratory judgment action for lack of justiciability only where the District Court certified same as appealable pursuant to 28 USCA §1292(b), which is not the case here. *Toilet Goods Association* v. *Gardner*, 360 F.2d 677 (2d Cir. 1966), *aff'd*, 387 U.S. 158, 387 U.S. 167 (1967). In *Toilet Goods*, upon such review, this Court further found the issue on such an appeal to be limited—to wit, not whether the grant of a declaratory judgment was in fact appropriate, but whether it would so clearly not be appropriate that dismissal *in limine* was required.

A District Court's refusal to join parties to an action alleged to be necessary is not a final order and cannot be appealed from. *Ritter* v. *Wyoga Gas & Oil Corp.*, 110 F.2d 524 (3rd Cir. 1940), *cert. denied*, 311 U.S. 669 (1940); *Metalock Repair Service, Inc.* v. *Harman*, 216 F.2d 611 (6th Cir. 1954). This Court has stated:

> "It is clear that '[d]enial of a motion to dismiss is not a final order and is therefore not appealable,' 2A Moore, Federal Practice, §12.14, at 2338 & n. 16 (2d ed. 1968), and this principal has been applied to a refusal to dismiss for failure to join indispensable parties." *Pepsico, Inc.* v. *F.T.C.*, 472 F.2d 179, 185 (2d Cir. 1972).

In an insurance company's declaratory judgment action seeking a declaration of non-liability under a policy, plaintiff moved to join an additional party defendant. On appeal from the denial of same by the District Court, the court found that such a denial was not a final judgment because it did not dispose of the motion, and therefore was not appealable under 28 U.S.C.A. §1291. Indeed, a

District Court's granting or refusal of such a motion is subject to revision at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of all the parties, and is not collateral because it is not independent of the merits of the case and would merge in the final judgment, is a step toward final disposition, is an ingredient of the cause of action, and is not final on the question presented. *Hartford Fire Insurance Co.* v. *Herrald,* 434 F.2d 638 (9th Cir. 1970).

US Life argues (Brief, pp. 15-21) that the mortgage was not a building loan and therefore no agreement need have been filed pursuant to §22 of the New York Lien Law and accordingly the Complaint should have been dismissed for failure to state a claim for relief. The denial of such a motion cannot be appealed. (See *supra,* p. 12).

A. The ruling of the court below was correct; a justiciable controversy exists

Even if the District Court's denial of US Life's motion to dismiss for lack of justiciability were appealable, there can be no question that there is an actual dispute between the parties as to whether the mortgage which was insured is a building loan requiring the filing of record of a building loan agreement and US Life's duties to DMI resulting therefrom, as well as DMI's need to know now whether US Life is liable under the insurance contract or by reason of its negligent acts. The parties are in disagreement as to the nature of the mortgage insured, and whether the policy coverage includes liability respecting any liens determined to be prior to the mortgage. Where the insurer disputes the extent and nature of coverage, a justiciable controversy exists warranting a declaratory judgment. *Vance Trucking Co.* v. *Canal Insurance Co.,* 243 F. Supp. 469 (W.D. So. Car.

1965); *Central Surety & Insurance Corp.* v. *Caswell*, 91 F.2d 607 (5th Cir. 1937); *Manhattan Fire and Marine Ins. Co.* v. *Nassau Estates II*, 217 F. Supp. 196 (D. N.J. 1963).

In the *Vance* case, the court held that a justiciable controversy existed and the declaratory judgment suit was not premature, stating at page 471:

> "Defendants admit that declaratory judgment actions have been widely used to determine liability of an insurance company in advance of trial if judgment may be obtained in the future against its insured, but contends that in the case here there can be no actual case or controversy between plaintiffs and defendants until liability is established. . . . The Court does not agree with this contention . . . [P]laintiffs' prayer for relief asks that the court declare Vance and Allstate to be free from any and all liability. . . . The court concludes that such is a real, and substantial controversy, the determination of which will be binding on all parties concerned."

B. The ruling of the court below was correct; the lienors are not indispensable parties

Nor should Judge Weinfeld have found that the lienors were indispensable parties whose failure to be joined required dismissal. F.R.C.P. Rule 19(b). The lienors' proof as to the validity and amount of their liens in Greene County does not detract from, nor add to the characterization of the nature of the defendant's obligations herein to the plaintiff under its insurance contract. The lienors were not parties to said contract, nor privy thereto, nor do they have any direct stake in the judgment sought herein. Their sole interest is in the pro-

perty *res* and their foreclosure action is in the nature of an *in rem* proceeding against Sleepy Hollow Lake. They have no interest in whether US Life must indemnify DMI due to the priority of their liens; indeed, "the insured has no direct obligations to the lienors under New York law" (Defendant-Appellant's Brief, p. 10).[1]

All of the cases relied upon by US Life (Brief, p. 12) to support its contention that the lienors are necessary parties involved injured persons who could eventually recover from the insurance company as the result of some negligence of that carrier's assured. In the instant case, the lienors will not have any recovery against the defendant insurance carrier as a result of the plaintiff's conduct. Here, plaintiff's conduct is not at issue. The lienors have no direct interest in whether defendant is proceeding in good faith, nor in the nature of the coverage afforded to plaintiff by defendant. While the characterization of the mortgage may subsequently affect entitlement of various parties to the fund of the proceeds of the sale of the property after the foreclosure judgment, the fund arises from the sale of the property and not from any obligation of the defendant to indemnify the plaintiff. Indeed, in *County of Wyoming, N.Y.* v. *Erie Lackawanna Ry.*, 360 F. Supp. 1212 (W.D. N.Y. 1973), in an action for declaratory judgment seeking to determine the extent of coverage available to plaintiff, it was even held that the injured parties who could eventually recover from the insurance company, and who were parties defendant, would be dropped as defendants because their presence destroyed the court's diversity jurisdiction. The court stated that a decision on indispensability was a practical one to be determined in the context of each litigation, and that there was no reason why a determination

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[1] US Life recognizes that no privity exists between the lienors and the parties herein [Defendant-Appellant's Brief, p. 11].

of rights and obligations existing under the insurance policies under consideration could not be fully made absent the injured claimants. See also, *Allstate Insurance Co.* v. *Philip Leasing Co.*, 214 F.Supp. 273 (D. S.D. 1963).

C. The ruling of the cou . below was correct; the Complaint states meritorious claims

Even if the denial of US Life's motion to dismiss was appealable the Complaint must be deemed true for purposes of such a motion and cannot be dismissed unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of a claim. *Ballou* v. *General Electric Co.*, 393 F.2d 398 (1st Cir. 1968). The record below makes it clear that there is a raging controversy between the parties as to the nature of the mortgage, the coverage of the insurance policy, and US Life's duties and obligations arising thereunder. (*Supra*, pp. 9-10.) The Complaint cannot be dismissed as a matter of law.

POINT III

The District Court did not abuse its discretion in failing to stay the subject action.

A District Court's grant or denial of a stay in a declaratory judgment action is a discretionary act and an appellate court's review is limited to the issue of abuse of that discretion. *Lear Siegler, Inc.* v. *Adkins*, 330 F.2d 595 (9th Cir. 1964).

The court below did not abuse its discretion in refusing to stay the instant action in favor of the state action. The case at bar concerns the breach of an insurance contract, the intervening negligence of US Life and the duties

and obligations arising out of the relationship between insured and insurer. The state court action is not dispositive of those issues. Nor can the state court action terminate this litigation for US Life has made it clear that if the lienors prove their priority position (such priority flowing only from a determination that DMI's mortgage was a building loan), then US Life will disclaim any responsibility to DMI and litigate the issue of the nature of the obligation it insured. A federal action will not be stayed where state action determination will not be dispositive of at least the controlling issues in the federal action. *Simon & Schuster, Inc.* v. *Cove Vitamin & Pharmaceutical, Inc.*, 211 F.Supp. 72 (S.D.N.Y. 1962). The burden is on the defendant to show that the state court decision would necessarily dispose of every issue in the federal action. *Kahn* v. *Rosenstiel*, 285 F.Supp. 61 (D. Del. 1968). US Life did not bear that burden in the court below and cannot show any abuse of discretion by Judge Weinfeld.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the court below should be affirmed.

Respectfully submitted,

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